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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 993

RADIO TELEVISION NEWS DIRECTORS ASSOCIATION, *ET AL.*,
Petitioners,

v.

UNITED STATES OF AMERICA AND FEDERAL COMMUNICATIONS COMMISSION,
Respondents.

PETITION FOR A WRIT OF CERTIORARI BEFORE JUDGMENT TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Of Counsel:

HARRY KALVEN, JR.
1111 East 60th Street
Chicago, Illinois 60637

MAURICE ROSENFIELD
208 South LaSalle Street
Chicago, Illinois 60604

Of Counsel:

HERBERT WECHSLER
435 West 116th Street
New York, New York 10027

NEWTON N. MINOW
208 South South LaSalle Street
Chicago, Illinois 60604

Of Counsel:

THOMAS E. ERVIN
HOWARD MONDERER
DOUGLAS E. CUTLER

ARCHIBALD COX
Langdell Hall
Cambridge, Massachusetts 02138

W. THEODORE PIERSON
ROBERT M. LICHTMAN
1000 Ring Building
Washington, D. C. 20036
Counsel for Petitioners, Radio Television News Directors Association, et al.

LLOYD N. CUTLER
J. ROGER WOLLENBERG
TIMOTHY B. DYK
900 17th Street, N. W.
Washington, D. C. 20006

RICHARD W. JENCKS
51 West 52 Street
New York, New York 10019
Counsel for Petitioner, Columbia Broadcasting System, Inc.

LAWRENCE J. MCKAY
RAYMOND L. FALLS, JR.
80 Pine Street
New York, New York 10005
Counsel for Petitioner, National Broadcasting Company, Inc.

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PETITION FOR A WRIT OF CERTIORARI BEFORE JUDGMENT TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioners Radio Television News Directors Association, *et al.* (RTNDA),[1] Columbia Broadcasting System, Inc. (CBS), and National Broadcasting Company, Inc. (NBC) seek a writ of certiorari before judgment in the United States Court of Appeals for the Seventh Circuit.

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[1]RTNDA's eight co-petitioners, who are licensees of radio and television stations located throughout the United States, are Bedford Broadcasting Corporation, Central Broadcasting Corporation, The Evening News Association, Marion Radio Corporation, RKO General, Inc., Royal Street Corporation, Roywood Corporation, and Time-Life Broadcast, Inc.

OPINIONS BELOW

There has been no judgment or opinion of the United States Court of Appeals for the Seventh Circuit. The July 5, 1967, and August 2, 1967, memorandum opinions and orders of the Federal Communications Commission (Appen. A, *infra*, pp. 1a-18a; Ra. 346-57; Appen. B, *infra*, pp. 19a-24a; Ra. 358-61)[2] are officially reported at 8 F. C. C. 2d 721, and 9 F. C. C. 2d 539. They are unofficially reported at 10 Pike & Fischer, R. R. 2d 1901, and 10 Pike & Fischer, R. R. 2d 1911.

JURISDICTION

The memorandum opinions and orders of the Federal Communications Commission under review were entered on July 5, 1967, and August 2, 1967. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1), 28 U. S. C. § 2101(e) and Rule 20 of the Rules of this Court.[3]

QUESTIONS PRESENTED

1. Whether every television or radio station that broadcasts a statement by any person attacking the "honesty, character, integrity or like personal qualities" of any individual or group during programs about controversial issues of public importance may, consistently with the Communications Act and the First Amendment, be required by the

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[2] "R. " references are to the certified record in the court of appeals. "Ra. " references are to the record before the Federal Communications Commission filed in the Seventh Circuit. "Rb. " and "Rc. " references are to the certified Second Circuit records in the CBS and NBC cases, respectively (containing the record made in those cases before they were transferred to the Seventh Circuit). See, *infra*, p. 7. References to "Appen. " are to the appendices to this petition.

[3] A discussion of the jurisdictional issue in this case appears, *infra*, at pp. 14-17.

Federal Communications Commission to notify the individual or group "attacked," furnish a tape, script or summary of the "attack" and offer free broadcast time for reply.

2. Whether, consistently with the Communications Act and the First Amendment, every television or radio station that broadcasts an editorial supporting or opposing a political candidate may be required by the Federal Communications Commission to give notice to disfavored candidates, furnish a copy of the editorial and offer free broadcast time for reply.

CONSTITUTIONAL PROVISION, STATUTES AND RULE INVOLVED

The constitutional provisions, statutes, and rule involved are the First Amendment to the United States Constitution, Sections 315 and 326 of the Communications Act of 1934, as amended, 47 U. S. C. §§ 315 and 326, Section 1254(1) of the Judicial Code, 28 U. S. C. § 1254(1), and Rule 20 of the Rules of this Court. These provisions are set forth as Appendix C to this petition.

STATEMENT

This case presents important questions as to whether the "personal attack" and "political editorial" regulations of the Federal Communications Commission (the "Commission"), which purport to expand and strengthen its earlier policies on these subjects, offend the First Amendment and exceed the Commission's statutory authority.

A challenge to the Commission's personal attack policy is now before the Court on review of a Commission order applying the policy to a single broadcast by a single station. No. 600, this Term, *Red Lion Broadcasting Co.* v. *FCC*, 381 F. 2d 908 (D. C. Cir.), *certiorari granted*, 36 U. S. Law Week 3226 (Dec. 4, 1967). The instant case presents the

same and other questions on review of new rules issued by the Commission after its order in *Red Lion,* purporting to codify its "personal attack" policy and applying new sanctions against any station that violates the rules. The importance of these issues and the close relationship of this case with *Red Lion* have been conceded by the Government.[4]

The rules at issue in this case require that if any radio or television station broadcasts an "attack . . . upon the honesty, character, integrity or like personal qualities of an identified person or group" during the presentation of views on a controversial issue of public importance, the station must afford notice to the individual or group attacked, furnish a tape, script or, if no tape or script is available, a summary of the attack, and supply broadcast time for reply.[5] The rules also create a right to notice and opportunity for reply to editorials by a broadcast licensee in favor of or in opposition to candidates for public office.

The personal attack sections of the rules, like the Commission's earlier less formal policy, apply not only when the station's own staff initiates a "personal attack," but also when the station broadcasts the newsworthy remarks of third persons concerning the honesty, character, integrity and other qualities of persons in the public eye.

The rules apply to criticisms of public officials and other public figures that are constitutionally privileged under the doctrine of *New York Times Co.* v. *Sullivan,* 376 U. S. 254 (1964), and *Curtis Publishing Co.* v. *Butts,* 388 U. S.

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[4]Brief for Respondents In Opposition, *Red Lion Broadcasting Co.* v. *FCC,* No. 600, this Term, p. 9; Respondents' Motion to Hold Petitions for Review in Abeyance, filed below in the Seventh Circuit, p. 3; R. 42.

[5]The Commission stated in its July 5, 1967, memorandum opinion and order that "Where the attack occurs on paid time, a question has arisen as to whether the response can also be required to be on paid time." Appen. A, p. 11a n. 8, Ra. 353 n. 8. For the governing rule on this issue it referred to its ruling in *Red Lion* that an offer of free time was required if the person or group "attacked" declined to pay.

130 (1967). The rules apply even when the statement constituting the attack is true, and even when the statement, although false, is broadcast in the good faith belief that it is true. They also apply even though the station's broadcasts dealing with the underlying public issue have stated all sides fully and fairly. They apply even though the station may recently have broadcast an interview with the subject of the "attack" in which he presented his side of the matter. They apply even though the station, promptly after the "attack", broadcasts the text of the subject's response without permitting the subject himself to appear. Only an offer made *after* the "attack" for a *subsequent* and *personal* appearance by the subject or his designated spokesman satisfies the requirements of the rules.

These rules were adopted after a formal rule making proceeding before the Commission. The proceeding was commenced on April 6, 1966, when the Commission issued a notice of proposed rule making inviting comments on a series of proposed personal attack and political editorial rules.[6] Comments were filed by a number of interested parties, including the petitioners. With a few exceptions, the broadcaster comments urged that the proposed rules and the earlier less formal policy on which they were based imposed such heavy burdens on the broadcast of public affairs programs as to deter licensees from making them.[7] For this and other reasons, a number of the comments chal-

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[6] 31 Fed Reg. 5710; Ra. 1-6.

[7] See the comments of Carroll M. Barringer (WLCO) (Ra. 113, 115-16); Bedford Broadcasting Corp., *et al.* (Ra. 123, 136-42) Cape Fear Telecasting, Inc. (Ra. 118, 121); Columbia Broadcasting System, Inc. (Ra. 102, 105-06); Corinthian Television Corp., *et al.* (Ra. 233, 238); Griffin Leake TV, Inc. (Ra. 215, 217-19); Interstate Broadcasting Co. (Ra. 67, 75-77); Mutual Broadcasting System, Inc. (Ra. 62, 64); National Association of Broadcasters (Ra. 48, 56-59); Storer Broadcasting Co. (Ra. 45, 46-47); WPSD TV (Ra. 17, 18). Altogether 18 of the 26 groups or individuals who filed comments with the Commission opposed the new rules.

lenged the Commission's constitutional and statutory authority to adopt the rules.[8]

On July 5, 1967, the Commission issued a memorandum opinion and order adopting the rules (effective August 14, 1967) substantially as proposed with Commissioner Bartley dissenting, and Commissioner Loevinger concurring separately.[9] The Commission majority relied heavily on the court of appeals decision in *Red Lion* and concluded in a lengthy opinion that the rules were not unconstitutional or otherwise unlawful. Appen. A, pp. 4a-5a, 13a; Ra. 348-49, 354.

On August 2, 1967, the Commission issued a supplementary memorandum opinion and order amending the proposed rules to exempt "bona fide newscasts" and "on-the-spot coverage of bona fide news events."[10] Appen. B, pp. 19a-24a; Ra. 358-61. The Commission's stated reason was that coverage of news events would be unreasonably impeded if time had to be devoted to replies to personal attacks occurring on prior news programs. Appen. B, p. 20a; Ra. 359. However, the Commission drew a sharp distinction between "hard news" programs and news-related programs such as news documentaries, news interviews and "editorials or similar commentary . . . broadcast in the course of . . . newscasts," and made the new rules speci-

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[8]See the comments of Bedford Broadcasting Corp., *et al.* (Ra. 123, 180-85); Columbia Broadcasting System, Inc. (Ra. 102, 104-06); Corinthian Television Corp., *et al.* (Ra. 233, 235-40); Griffin Leake TV, Inc. (Ra. 215, 217); Mutual Broadcasting System, Inc. (Ra. 62, 63-64). See also the comments of the National Association of Broadcasters (Ra. 48, 53-59). Several comments supported the Commission's constitutional authority to adopt the rules. International Typographical Union (Ra. 13-14); United Steelworkers (Ra. 251, 254-55).

[9]Appen. A, pp. 1a-18a; Ra. 346-57.

[10]The Commission concluded that such programs were nevertheless subject to the "general fairness doctrine." Appen. B, p. 20a; Ra. 358.

fically applicable to such news-related programs.[11] Appen. B, p. 31a; Ra. 359.

On July 27, 1967, petitioners Radio Television News Directors Association, *et al.* (RTNDA) (R. 1-19) and Columbia Broadcasting System, Inc. (CBS) (Rb. 2-24) sought review of the Commission's orders in the United States Court of Appeals for the Seventh and Second Circuits, respectively, challenging the new rules on the grounds that they are unlawful under the First Amendment and the Communications Act (particularly Sections 315 and 326, as amended, 47 U. S. C. §§ 315, 326).[12] On August 31, 1967, petitioner National Broadcasting Co., Inc. (NBC) sought review on similar grounds in the Second Circuit (Rc. 2-27).

The CBS and NBC petitions were transferred to the Seventh Circuit pursuant to 28 U. S. C. § 2112 (Rb. 41 and Rc. 34) and were consolidated for hearing together with the RTNDA petition for review (R. 39).[13] After petitioners filed their brief, respondents, before filing their own brief, moved to stay further proceedings in the Seventh

[11]As in its original opinion, the Commission emphasized that licensees who "choose" to include personal attacks on such programs must accept the burden of complying with the rules. The Commission concluded (Appen. B, p. 21a; Ra. 359):

> "since the licensee has chosen to present a personal attack in his editorial, he should not be the one to determine wholly what the public shall or shall not hear on the other side of a matter affecting the integrity, honesty, and like personal qualities of the person attacked."

[12]Supplemental petitions for review were filed by petitioners RTNDA (R. 20-26) and CBS (Rb. 27-35) to take account of the issues raised by the Commission's August 2, 1967, amendment to its rules.

[13]The Seventh Circuit has jurisdiction of this case under Section 2 of the Judicial Review Act of 1950, as amended, 28 U. S. C. (Supp. II) § 2342; Section 402(a) of the Communications Act of 1934, as amended, 47 U. S. C. § 402(a); and Section 10(c) of the Administrative Procedure Act, as amended, 5 U. S. C. § 704.

Circuit pending this Court's decision in *Red Lion* (R. 40-44). At petitioners' suggestion, and based on their representation that they intended to file this petition for certiorari promptly, the Seventh Circuit on January 2, 1968, deferred respondents' time to file briefs until 30 days after disposition of this petition (R. 50-51).

Petitioners seek certiorari in this case before judgment in the court of appeals pursuant to 28 U. S. C. § 1254(1) and Rule 20 of the Rules of this Court.

REASONS FOR GRANTING THE WRIT

I.

The formal rules challenged in this case present critical questions concerning the power of the Commission to regulate the freedom of radio and television broadcasters to present discussion of controversial issues of high public importance. The significance of the issues is conceded. An earlier, specific application of the personal attack doctrine on which the rules are predicated is already before the Court in *Red Lion Broadcasting Co.* v. *FCC*, No. 600, this Term, *certiorari granted*, December 4, 1967.[14]

This petition for certiorari before judgment is being filed to provide this Court with an opportunity to hear and decide this challenge to the formal rules along with *Red Lion*. Granting the writ would be of immeasurable value

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[14]The petitioners' briefs in that case are due on January 26, 1968. Respondents' brief is due on February 25, 1968.

Petitioners CBS and NBC filed briefs amicus curiae suggesting that the petition in *Red Lion* be held pending decision of this case by the Seventh Circuit so that the two related proceedings could be considered together by this Court. In granting certiorari in *Red Lion* and scheduling it for argument in the normal course, this Court said nothing which would foreclose other possible methods of bringing this case before this Court for consideration together with *Red Lion*.

to all who engage in broadcast journalism or rely upon it for information and also, we believe, of great assistance to this Court in considering *Red Lion.*

1. Respondents have represented that the instant case presents "the same fundamental issues of the constitutionality and statutory basis of the Commission's fairness doctrine and personal attack policy as does *Red Lion* . . . ." Respondents' Motion to Hold Petitions for Review in Abeyance (7th Cir.), p. 3; R. 42. We agree with this view to the extent that if *Red Lion* were decided in favor of the broadcaster petitioners, the same result should follow in the instant case. But this case contains additional elements requiring consideration at the same time the "fundamental issues" are determined in *Red Lion.* It is the rules challenged in the instant case that state the current obligations of all broadcasters under the personal attack doctrine. The rules also involve closely related applications of the basic "fairness" principle which are not presented in the *Red Lion* case, but which help to illuminate the constitutional issues raised by *Red Lion.*

First, in *Red Lion* the only ruling involved is a specific Commission directive, issued after the fact, to allow a named individual broadcast time to respond to a specific and previously broadcast program. But the principal inhibitory effect upon speech is felt at the time programs are selected and scripts are prepared, when the broadcaster has only the rules or other expressions of the policy before him and not the specificity of a particular after-the-fact directive. A major constitutional objection to the policy, aggravated by the vague and encompassing language in which the rules are cast, is that broadcasters are impelled to engage in self-censorship, steering wide of the dangerous zone because of the burdens imposed as well as the uncertainty as to the circumstances in which they apply. It is doubtful

whether this fundamental aspect of the problem can be fully considered in the *Red Lion* case where only a specific after-the-fact ruling is in issue.

Second, the only formal sanction for violation of the order at issue in *Red Lion* is for the Commission to deny renewal of Red Lion's license when it expires. Violation of the new rules challenged in the present case invokes possible liability for civil forfeitures, criminal fines, and cease and desist orders, in addition to loss of license. The rules were adopted expressly to promote more vigorous enforcement of the "personal attack" policy.[15] The difference is important here because the wider range of sanctions makes it more likely that one or more will be invoked, thus giving the rules a more chilling effect upon the broadcast discussion of public issues. Moreover, the First Amendment may require greater specificity in regulations enforceable by immediate criminal penalties. While we submit that the threat of loss of license brings all the First Amendment safeguards into play, the impact of these additional sanctions should also be before the Court when the basic constitutional issues are considered.

Third, the Commission's rules require every radio or television station that broadcasts an editorial supporting or opposing a political candidate to notify each disfavored candidate, supply a copy of the editorial, and offer free broadcast time for reply. The inhibiting effect upon editorial endorsements, particularly in multi-candidate elections, is obvious. The constitutionality and statutory

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[15]The Commission in its July 5, 1967, Memorandum Opinion and Order (Appen. A, pp. 6a-7a; Ra. 350) noted that "Despite such notification [in policy statements by the Commission] and the Commission's rulings, the procedures specified have not always been followed, even when flagrant personal attacks have occurred in the context of a program dealing with a controversial issue. It is for this reason that we now codify the procedures which licensees are required to follow in personal attack situations."

legality of this restraint upon the freedom of electronic journalism ought to be considered along with the "personal attack" issues because doing so would add a new dimension to the Court's inquiry into the rationale and consequences of the Commission's action.

2. The impact of the Commission's personal attack doctrine will not be confined to licensees of "extremist" political persuasion. Its chilling effect will be felt by all broadcast journalists.

For example, the rules apply to all editorial commentaries, news interviews and news documentaries. The Eric Sevareid editorial commentaries broadcast during the year ending October 12, 1967, by some 400 stations affiliated with the CBS radio and television networks contained more than 50 statements that at least arguably were "personal attacks." The weekly *Face the Nation*[16] news interview programs broadcast by the same stations from March 1966 to October 1967 contained 75 or more statements that at least arguably were "personal attacks." Numerous statements at least arguably "personal attacks" were also contained in recent CBS news documentary programs, as might be surmised from the titles of these programs alone ("Black Power—White Backlash," "Murder and the Right to Bear Arms,"

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[16]As noted above, the Commission has exempted "hard news" programs from the rules, but has specifically applied them to news interview, editorial and documentary programs. The slippery and untenable nature of this distinction is illustrated by the fact that 58 of the 85 weekly *Face the Nation* programs broadcast in the 20 months ending in November 1967 resulted in New York Times or Washington Post news stories the following day. Nineteen of the programs created front page stories in the Times or Post or both. NBC's *Meet the Press* has been equally creative in making news. Perhaps the ultimate absurdity is that a statement made in a *Meet the Press* or *Face the Nation* program is subject to the personal attack rules when first broadcast on Sunday afternoon, but is exempt from the rules when repeated as part of a "bona fide newscast" broadcast the same evening.

"The New Left," "The Warren Report," "Robert F. Kennedy," "Civil Rights: The View From the South").[17]

It will be impracticable for any network or station or the broadcast journalists who prepare and conduct these programs to continue doing so if every statement arguably constituting an "attack" obliges the network and station to find and notify the individual or group mentioned, furnish a tape, script or summary of the attack and, if the offer of reply time is accepted, displace some other scheduled program or program material to provide the necessary time. The networks, stations and journalists concerned will have to choose between eliminating the offending statements from the programs—thus sapping their journalistic vigor and integrity—and abandoning entirely presentation of significant news editorial, interview and documentary discussions of public issues via the broadcast medium.

For some stations, the sheer economic impact of providing free time and processing personal attack claims may prove insuperable. But even for the larger broadcast operations, the practical burdens are of great moment, and will have a significant inhibitory effect.

Resolution of the legality of the Commission's new rules is particularly important early in this Presidential and Congressional election year, when requests under the Commission's rules for reply time to attacks on editorials involving candidates, prospective candidates, public officials and other public figures can be expected to multiply.[18] For

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[17]For the text of these "attacks" and a more detailed description of the problems which would be encountered in providing reply time see the CBS brief (pp. 23-42) and Exhibit filed in the Seventh Circuit. Copies of the CBS brief and Exhibit in the Seventh Circuit were filed with this Court at the time that it was considering the petition for certiorari in *Red Lion*.

[18]See *New York Times*, December 22, 1967, p. 30, col. 3 (commentary by James Reston).

example, on December 20, 1967, a spokesman for Senator Eugene McCarthy demanded that CBS, NBC and ABC afford Senator McCarthy time to reply to an alleged personal attack made by President Johnson in a television interview on December 19, 1967.[19] When the networks declined, Senator McCarthy filed a complaint with the Commission. A large number of requests from candidates can also be expected under the political editorial sections of the rules.[20] The constitutionality and enforceability of the new rules will be repeatedly at issue until their validity is authoritatively decided by this Court.

3. The instant case presents a more complete record than the bare exchange of letters giving rise to the *Red Lion* litigation, because it results from a formal rule making proceeding and shows the anticipated effect of the Commission's rules on all broadcast journalism.

The constitutional questions presented are both novel and fundamental. The decision will have major impact not only upon the entire broadcasting industry but, more importantly, upon the vigor and quality of the discussion of public affairs in the United States. It is of the utmost importance, we submit, that all major facets of the question be fairly before the Court and that more than one representative of broadcast journalism be heard when the key decision is rendered.

4. Since this case is closely related and complementary to *Red Lion,* we urge that certiorari before judgment in

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[19]The President referred to "the Kennedy-McCarthy movement" and stated:

> "I just observe they have had some meetings and some discussions. I do know the interest of both of them in the Presidency and the ambition of both of them. I see that reflected from time to time."

[20]*Cf.* Brief Amicus Curiae on Behalf of King Broadcasting Co. filed below in the Seventh Circuit.

the court of appeals is appropriate. On numerous occasions this Court has granted certiorari before judgment in order to bring cases before it for consideration together with pending related proceedings.[21]

II.

1. The jurisdiction of the Court to entertain this petition requires brief discussion. The question of whether it would be a constitutional exercise of "appellate" jurisdiction for this Court to grant certiorari before judgment in a case that has reached the court of appeals directly from a federal administrative agency does not appear to have been decided.[22]

We submit that the initial judicial review of agency action is an exercise of appellate rather than original juris-

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[21]For example, in *Porter* v. *Dicken*, 328 U. S. 252 (1946), this Court granted certiorari before judgment in a case which presented issues similar to those raised in the pending case of *Porter* v. *Lee*, 328 U. S. 246 (1946). Both actions involved the jurisdiction of the Federal district court to restrain eviction of tenants under a state court order allegedly in violation of the Emergency Price Control Act. The Court explained that it was "prompted to bring the District Court's judgment directly to this Court for review by reason of the close relationship of the important question raised to the question presented in *Porter* v. *Lee* . . . ." *Id.* at 254. See *McCulloch* v. *Sociedad Nacional*, 372 U. S. 10, 12 (1963); *Hannah* v. *Larche*, 363 U. S. 420, 422 n. 3 (1960); *United States* v. *Thomas*, 361 U. S. 950 (1960); *McElroy* v. *Guagliardo*, 361 U. S. 281, 283 (1960); *Taylor* v. *McElroy*, 360 U. S. 709, 710 (1959); *Reid* v. *Covert*, 354 U. S. 1, 5 (1956); *Bolling* v. *Sharpe*, 347 U. S. 497, 498 (1954); *United States* v. *Bankers Trust Co.*, 294 U. S. 240, 243 (1935); *Graham & Foster* v. *Goodcell*, 282 U. S. 409, 411-12, 415 n. 2 (1931); *Johnson* v. *Fleet Corporation*, 280 U. S. 320, 324-25 (1930). See also *Brown* v. *Board of Education*, 344 U. S. 1, 3 (1952) (Court took judicial notice of *Bolling* v. *Sharpe*, then pending in the court of appeals, and invited a petition for certiorari before judgment in order to consider similar constitutional issues).

[22]See STERN AND GRESSMAN, SUPREME COURT PRACTICE, pp. 20-21 (3rd ed. 1962); ROBERTSON & KIRKHAM, JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES § 132 (Wolfson & Kurland ed. 1951).

The argument against such jurisdiction rests on the premise that, in certiorari before judgment, the Supreme Court is exercising direct

diction, regardless of whether the review is conducted in the first instance by the court of appeals or by this Court on certiorari before judgment in the court of appeals.

The basic test of appellate jurisdiction was stated by Chief Justice Marshall in *Marbury* v. *Madison*, 1 Cranch (5 U. S.) 137, 175 (1803):

> "It is the essential criterion of appellate jurisdiction, that it revises and corrects the proceedings in a cause already instituted, and does not create that cause."

In reviewing decisions of the Federal Communications Commission, the courts of appeals perform an appellate function in a "cause already instituted" before the Commission.

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review over the agency. *Cf. United States* v. *Rice*, 327 U. S. 742, 747 (1946); *Wheeler Lumber Bridge & Supply Co.* v. *United States*, 281 U. S. 572, 576 (1930). But as stated in the text, we submit that when judicial review of agency action rests upon a statutory plan requiring that questions of law initially be resolved by the agency before being reviewed in a court, the initial review by the court may properly be deemed the exercise of appellate jurisdiction. See STERN AND GRESSMAN, *supra*, pp. 20-21.

The jurisdictional problem was discussed in the petition for certiorari in *International Ass'n of Machinists* v. *NLRB*, 361 U. S. 881 (1959), which sought certiorari before judgment in a court of appeals proceeding to review an NLRB order. Certiorari was denied without comment, and other considerations may well have dictated this action by the Court. In *Ickes* v. *Associated Industries*, 319 U. S. 739 (1943), the Court granted certiorari before judgment in a federal agency case, but there the court of appeals had entered an interim order which was the subject of this Court's review.

In *Ex parte Vallandigham*, 1 Wall. (68 U.S.) 243 (1864), this Court indicated that it had no power to review proceedings of a military commission by certiorari because this would constitute an exercise of original jurisdiction. A military commission is hardly comparable to an adminstrative agency granted quasi-judicial powers by Act of Congress, and subject to a specific statutory procedure for judicial review of a limited and essentially appellate nature. In any event this and other issues relating to the Court's jurisdiction over military tribunals were treated as open questions in a series of cases in which original habeas corpus was sought to review convictions of the international war crimes tribunals in World War II. See generally HART & WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM (1953), pp. 284-87; Fairman, *Some New Problems of the Constitution Following the Flag*, 1 STAN. L. REV. 587 (1949).

The fact that Congress has made Commission orders reviewable in the courts of appeals rather than the district courts and the manner Congress chose to do so confirm that this review is appellate rather than original in nature. Previously Section 402(a) of the Communications Act of 1934, 48 Stat. 1093, incorporated the review provisions of the Urgent Deficiencies Act of 1913, 38 Stat. 219, which provided for a trial *de novo* in a three-judge district court with direct appeal to the Supreme Court. In 1950 Congress repealed that statute and vested review in the courts of appeals of Commission orders of the type here involved. 64 Stat. 1129 (1950). On review, the court of appeals is limited to the record before the agency (28 U. S. C. (Supp. II) § 2347)[23] and may not consider any questions of law or fact not presented to the agency. See 47 U. S. C. § 405.

Where, as here, the question of the agency's power is raised, this issue must first be raised before the Commission, and the Commission decides in the first instance the constitutionality and statutory validity of the action it proposes to take. If the court of appeals finds that the Commission erred in interpreting or applying its power, the court cannot go on to promulgate some different order; as in most appellate review it can only return the matter to the Commission for further action consistent with the judgment of the court. *FPC* v. *Idaho Power Co.*, 344 U. S. 17 (1952); *FCC* v. *Pottsville Broadcasting Co.*, 309 U. S. 134 (1940).[24]

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[23] If there is a need to supplement the record, the proceeding is sent to a district court or is remanded to the agency for this purpose. 28 U. S. C. (Supp. II) § 2347(b) and (c).

[24] It is clearly irrelevant that the Commission performs non-judicial functions as well as judicial functions for it is the nature of the decision in question rather than the character of the tribunal which is determinative. See STERN AND GRESSMAN, *supra*, pp. 20-21.

This Court has frequently reviewed judicial decisions of non-Article III tribunals even though those tribunals also carried on activities which were clearly non-judicial in nature. See *Pope* v. *United States*, 323 U. S. 1, 12-13 (1944). See also *O'Donoghue* v. *United States*, 289 U. S. 516, 546 (1933); *Williams* v. *United States*, 289 U. S. 563, 564 (1933).

Thus, when a party before the Commission files a petition to review the legality of the Commission's order, it is asking the court of appeals to conduct an appellate, not an original, review of the Commission's actions. Compare *Federal Radio Commission* v. *General Electric Co.*, 281 U. S. 464 (1930), with *Federal Radio Commission* v. *Nelson Brothers Co.*, 289 U. S. 266 (1933). Compare *Postum Cereal Co.* v. *California Fig Nut Co.*, 272 U. S. 693 (1927), with *Brenner* v. *Manson*, 383 U. S. 519 (1966). See also *United States* v. *Storer Broadcasting Co.*, 351 U. S. 192 (1956); *Columbia Broadcasting System, Inc.* v. *United States*, 316 U. S. 407 (1942). In such a case, we submit that review by this Court on certiorari before judgment is no less appellate in character.

A contrary ruling would mean that, notwithstanding the gravity and urgency of the issues involved, Congress could not constitutionally authorize this Court to conduct direct review of administrative agency action, even in circumstances where the national interest plainly required a prompt and authoritative decision. Nothing in the Constitution requires such an impracticable, if not paralyzing, limitation on the legislative and judicial powers.[25]

2. Decision of certified questions in this case would clearly be a constitutional exercise of appellate jurisdic-

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[25]Congress has conferred on this Court statutory power to grant certiorari before judgment in the broadest possible terms. Title 28 U. S. C., Section 1254(1) covers all types of cases pending in courts of appeals, including petitions to review agency orders. While Section 10 of the Judicial Review Act of 1950, 28 U. S. C. (Supp. II) § 2350, refers specifically only to certiorari review of injunctions and final judgments in cases involving agency orders, this and similar statutes providing for review by certiorari of agency action "are merely cumulative, and do not in any way broaden or restrict the provisions of 28 U. S. C. § 1254(1)." ROBERTSON & KIRKHAM, *supra*, § 129 at 231; STERN AND GRESSMAN, *supra*, at 18. See also *Abbott Laboratories* v. *Gardner*, 387 U. S. 136, 144 (1967), construing agency statutes authorizing judicial review of certain classes of orders as not precluding judicial review of other agency orders.

tion,[26] and is expressly authorized in agency review cases by Section 10 of the Judicial Review Act of 1950, 28 U. S. C. (Supp. II) § 2350, which incorporates the general provisions of 28 U. S. C. § 1254(3). Accordingly, if this Court should be disposed to hear this case on the merits but should have doubt as to its jurisdiction to grant certiorari before judgment, we respectfully suggest that this Court either set the jurisdictional issue for briefing and oral argument together with the merits, or else deny certiorari in an order stating that denial is without prejudice to an immediate application to the Seventh Circuit for certification of the issues to this Court.[27]

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[26] *United States* v. *Rice*, 327 U. S. 742, 747 (1946); *Scripps-Howard Radio, Inc.* v. *FCC*, 316 U. S. 4 (1942); *Wheeler Lumber Bridge & Supply Co.* v. *United States*, 281 U. S. 572, 576 (1930); *Old Colony Trust Co.* v. *Commissioner*, 279 U. S. 716, 728-29 (1929).

[27] Compare *Wisniewski* v. *United States*, 353 U. S. 901, 902 (1957), in which this Court concluded that certification, while inappropriate in most cases, is appropriate in "rare instances, as for example [in situations involving] the pendency of another case before this Court raising the same issue, when certification may be advisable in the proper administration and expedition of judicial business."

CONCLUSION

For the reasons set forth above this petition for a writ of certiorari should be granted, and the case should be set for argument together with No. 600, this Term, *Red Lion Broadcasting Co.* v. *FCC*. If the Court grants certiorari, petitioners are prepared to conform to any briefing schedule necessary to have this case heard this Term, including, if necessary, reliance on their Seventh Circuit briefs as their initial briefs in this Court.

Respectfully submitted,

Of Counsel:

HARRY KALVEN, JR.
1111 East 60th Street
Chicago, Illinois 60637

MAURICE ROSENFIELD
208 South LaSalle Street
Chicago, Illinois 60604

ARCHIBALD COX
Langdell Hall
Cambridge, Massachusetts 02138

W. THEODORE PIERSON
ROBERT M. LICHTMAN
1000 Ring Building
Washington, D. C. 20036
Counsel for Petitioners, Radio Television News Directors Association, et al.

Of Counsel:

HERBERT WECHSLER
435 West 116th Street
New York, New York 10027

NEWTON N. MINOW
208 South LaSalle Street
Chicago, Illinois 60604

LLOYD N. CUTLER
J. ROGER WOLLENBERG
TIMOTHY B. DYK
900 17th Street, N. W.
Washington, D. C. 20006

RICHARD W. JENCKS
51 West 52 Street
New York, New York 10019
Counsel for Petitioner, Columbia Broadcasting System, Inc.

Of Counsel:

THOMAS E. ERVIN
HOWARD MONDERER
DOUGLAS E. CUTLER

LAWRENCE J. McKAY
RAYMOND L. FALLS, JR.
80 Pine Street
New York, New York 10005
Counsel for Petitioner, National Broadcasting Company, Inc.

Appendix A

FCC 67-795
2227

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

Washington, D. C. 20554

IN THE MATTER OF Amendment of Part 73 of the Rules to provide procedures in the event of a personal attack or where a station editorializes as to political candidates.	Docket No. 16574

MEMORANDUM OPINION AND ORDER

Adopted July 5, 1967 ; Released July 10, 1967

By the Commission:

Commissioner Bartley dissenting and issuing a statement;
Commissioner Loevinger concurring and issuing a statement;
Commissioner Wadsworth absent.

1. On April 6, 1966 the Commission adopted a Notice of Proposed Rule Making (FCC 66-291) to provide procedures in the event of certain personal attacks and where a station editorializes as to political candidates. This Notice was published in the Federal Register of April 13, 1966 (31 Fed. Reg. 5710). Upon the request of the National Association of Broadcasters, the time for filing comments and reply comments was extended to June 20 and July 5, 1966, respectively (31 Fed. Reg. 6838, May 7, 1966).

2. Comments were timely filed by Carrol M. Barringer (WLCO), Bedford Broadcasting Corp. (WBIW), *et al.*,[1] Cape Fear Telecasting, Inc., Colorado Broadcasters Association, Columbia Broadcasting System, Inc., Corinthian Television Corp., *et al.*, Golden Empire Broadcasting Co., Griffin-Leake TV, Inc., Interstate Broadcasting Co., Meridith Broadcasting Co., Mutual Broadcasting System, Inc., Mission Broadcasting Co., National Association of Broadcasters, National Broadcasting Co., Inc., Storer Broadcasting Co., Trigg-Vaughn Stations, Inc., WIBC, Inc., and WPSD-TV, generally in opposition to the rules. Comments favoring the rules were received from the American Civil Liberties Union,[2] Joseph H. Chislow, International Typographical Union (AFL-CIO), Laborers' International Union of North America (AFL-CIO), National Council of the Churches of Christ, National Rifle Association of America, The Pacifica Foundation, and the United Steel Workers of America, AFL-CIO.

3. The purpose of embodying the procedural aspects of the Commission's long-adhered-to personal attack principle and political editorial policy in its Rules is twofold. It will clarify and make more precise the obligations of

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[1]On July 8, 1966, Bedford Broadcasting Corp., *et al.*, submitted, together with a motion to accept the Addendum, an Addendum to their comments, consisting of excerpts from an "Economic Analysis of Competition in the Daily Newspaper Business," prepared by Jessee Markham, Professor of Economics, Princeton University. No reason was given for the failure to submit the material in a timely fashion. The motion to accept the addendum is denied. (47 C. F. R. 1.415(d)).

[2]The informal comments submitted by the A. C. L. U. reflect an apparent mis-reading of the proposed rules in that the comments state the "rule-making specifically exempts personal attacks in the context of the discussion of controversial issues . . ." In fact this is the situation expressly covered by the proposed rules.

broadcast licensees where they have aired personal attacks and editorials regarding political candidates. Further, in the event of failure to comply with these rules, the Commisison will be in a position to impose appropriate forfeitures (§ 503(b) of the Act) in cases of clear violations by licensees which would not warrant designating their applications for hearing at renewal time or instituting revocation proceedings but on the other hand do warrant more than a mere letter of reprimand. Of course, pursuant to § 503(b) of the Act, only the willful or repeated violation of these rules can result in forfeiture. We stress that the personal attack principle is applicable only in the context of the discussion of a controversial issue of public importance. See par. 10, *infra*.

4. These rules will serve to effectuate important aspects of the well established Fairness Doctrine; they do not alter or add to the substance of the Doctrine.[3] As set forth in the 1949 *Report of the Commission in the Matter of Editorialization by Broadcast Licensees, 13 F. C. C. 1246 at 1249 (1949)*, "the development of an informed public opinion through the public dissemination of news and ideas concerning the vital public issues of the day" is the keystone of the Fairness Doctrine. "It is this right of the public to be informed, rather than the right on the part of the government, any broadcast licensee or any individual member of the public to broadcast his own particular views on any matter, which is the foundation stone of the American system of broadcasting." *Ibid.* The Fairness Doctrine as a basic delineation of a standard of public interest in

[3]The only new requirement in these rules are the time limits, discussed in paragraphs 12 and 15, *infra*, within which licensees must act to fulfill their substantive obligations when they have broadcast personal attacks or political editorials.

broadcasting was given specific Congressional approval in the 1959 amendment of Section 315(a) of the Communications Act, 73 Stat. 557, 47 U. S. C. 315(a). The personal attack principle is simply a particular aspect of the Fairness Doctrine. The principle stems from the Commission's language in the 1949 *Report* that "elementary considerations of fairness may dictate that time be allocated to a person or group which has been specifically attacked over the station . . ." 13 F. C. C. 1252. The standard of fairness similarly dictates that where a licensee editorializes for or against a candidate the appropriate spokesman for the conflicting point of view is the opposed candidate's representative, or, if the licensee so chooses, the candidate himself. "These concepts, of course, do restrict the licensee's freedom to utilize his station in whatever manner he chooses but they do so in order to make possible the maintenance of radio as a medium of freedom of speech for the general public." 1949 *Report, supra,* 13 F. C. C. 1250.

5. Several of the parties contend that the Fairness Doctrine and the personal attack principle are unconstitutional infringements of broadcasters' rights of free speech and free press under the First Amendment. We believe these contentions are without merit. We have discussed the constitutionality of the fairness doctrine generally in the *Report on Editorialization,* 13 F. C. C. 1246-1270. "We adhere fully to that discussion, and particularly the considerations set out in paragraphs 19 and 20 of the Report." *Letter to John H. Norris* (WGCB), 1 F. C. C. 2d 1587, 1588 (1965). The court in reviewing the constitutonality of the personal attack principle of the Fairness Doctrine in *Red Lion,*[4] concluded "that there is no abrogation of the

[4] *Affirmed sub. nom. Red Lion Broadcasting Co., Inc.* v. *F. C. C.,* Case No. 19,938, D. C. Cir. (June 13, 1967).

petitioners' [licensees'] free speech right . . . I find in the Fairness Doctrine a vehicle completely legal in its origin which implements by use of modern technology the 'free and general discussion of public matters [which] seems absolutely essential for an intelligent exercise of their rights as citizens,' *Grosjean* v. *American Public Press, supra* at 249." *Red Lion, supra,* at 41. As to these particular rules, we stress again that they do not proscribe in any way the presentation by a licensee of personal attacks or editorials on political candidates. They simply provide that where he chooses to make such presentations, he must take appropriate notification steps and make an offer for reasonable opportunity for response by those vitally affected and best able to inform the public of the contrasting viewpoint. That such rules are reasonably related to the public interest is shown by consideration of the converse of the rules—namely operation by a licensee limited to informing the public of only one side of these issues, i.e., the personal attack or the licensee's editorial.[5]

6. The addition of Section 73.123(a), (b) (and also 73.300-FM; 73.598—Educational FM; 73.679-TV of identical language) to the Rules serves to codify what has long been the Commission's interpretation of the personal attack aspect of the Fairness Doctrine. *Report on Editorialization by Broadcast Licensees,* 13 F.C.C. 1246, 1258 (1949); *Clayton W. Mapoles,* 23 Pike & Fischer, R.R. 586 (1962); *Billings Broadcasting Co.,* 23 Pike & Fischer, R. R. 951 (1962). "Thus, we have repeatedly stated that when a li-

[5]In situations not involving a personal attack or an editorial on a political candidate, the licensee may of course exercise his good faith reasonable judgment as to the appropriate spokesman for a contrasting point of view which the licensee determines should be presented. 1949 *Report, supra,* 13 F. C. C. at 1251.

censee, in connection with its coverage of a controversial issue, broadcasts a personal attack on an individual or organization, it must 'transmit the text of the broadcast to the person or group attacked . . . either prior to or at the time of the broadcast, *with a specific offer of his station's facilities for an adequate response.*' Public Notice of July 26, 1963; Controversial Issue Programming, F. C. C. 63-734 (emphasis supplied)." *Springfield Television Broadcasting Corp.*, 4 Pike & Fischer, R. R. 2d 681, 685 (1965). This duty devolves upon the licensee, because other than in the case of a broadcast by political candidates, the licensee is responsible for all material broadcast over his facilities.

7. As the Notice pointed out, the Commission has set forth the obligation of a licensee when a personal attack occurs during the discussion of a controversal issue of public importance, i.e., the licensee must notify the individual or group attacked of the facts, forward a tape, transcript or accurate summary of the personal attack, and extend to the individual or group attacked an offer of time for the broadcast of an adequate response. See *Clayton W. Mapoles*, 23 Pike & Fischer, R. R. 586 (1962); *Billings Broadcasting Co.*, 23 Pike & Fischer, R. R. 951 (1962); *Times-Mirror*, 24 Pike & Fischer, R. R. 404 and 407 (1962); and *Springfield Television Broadcasting Corp.*, 4 Pike and Fischer, R. R. 2d 681, 685 (1965); *Radio De Land, Inc. (WJBS)*, 1 FCC 2d 935 (1965). We notified all licensees of their responsibility in this respect, by transmitting to them the July 26, 1963 Public Notice (FCC 63-734) and the 1964 Fairness Primer, *supra*. Despite such notification and the Commission's rulings, the procedures specified have not always been followed, even when flagrant personal attacks have occurred in the context of a program dealing with a controversial issue. It is for this reason that we now

codify the procedures which licensees are required to follow in personal attack situations. These rules will in no way lessen the force and effect of the Fairness Doctrine as it obliges licensees who permit their facilities to be used for the discussion of controversial issues of public importance to afford a reasonable opportunity for the presentation of conflicting views. Nor do they detract in any manner from a licensee's duty not to "withhold from expression over his facilities relevant news or facts concerning a controversery or . . . slant or distort the presentation of such news." *Report on Editorialization, supra.*

8. The obligation for compliance with these rules is on each individual licensee as it is for compliance with the Fairness Doctrine generally. *Capitol Broadcasting Co.*, 2 Pike & Fischer, R. R. 2d 1104 (1964). Where a personal attack or editorial as to a candidate on a network program is carried by the licensee, the licensee may not avoid compliance with the rules merely because the attack or editorial occurred on a network program. Of course, if the network provides appropriate notice and opportunity for response and the licensee carries such response, its obligation would be satisfied.

9. A major purpose of the rules is to clarify and make more precise the procedures which licensees are required to follow in personal attack situations. The long-applied standard of what constitutes a personal attack remains unaffected by this codification:

> [T]he personal attack principle is applicable where there are statements, in connection with a controversial issue of public importance, attacking an

> individual's or group's *integrity, character, or honesty* or like personal qualities, and not when an individual or group is simply named or referred to. *Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance,* Public Notice of July 1, 1964, footnote 6.

Thus, no matter how strong the disagreement as to views may be, the personal attack principle is not applicable (See *Letter to Pennsylvania Community Antenna Television Association, Inc.,* 1 FCC 2d 1610); it becomes applicable only where in the context of the discussion of a controversial issue of public importance, there is an attack on an individual's or group's integrity, etc., as noted above. As stated in the Notice of Proposed Rule Making, we recognize that in some circumstances there may be uncertainty or legitimate dispute concerning some aspects of the personal attack principle, such as whether a personal attack has occurred in the context of a discussion of a controversial issue of public importance, or whether the group or person attacked is "identified" sufficiently in the context to come within the rule. The rules are not designed to answer such questions. When they arise, licensees will have to continue making good faith judgments based on all of the relevant facts and the applicable Commission interpretations.[6] As we stated

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[6]In appropriate cases, licensees can and should promptly consult the Commission for interpretation of our rules and policies.

This would be the appropriate procedure should there arise a question of the applicability of the principle to a factual situation, such as the hypothetical one posed by the National Broadcasting Company's comments, of an attack made in the context of a discussion of controversial issue of public importance, which does not itself constitute such an issue. We note that in our experience thus far, the attack made in the context of the controversial issue has been germane to the issue.

in the Notice of Proposed Rule Making, the rule will not be used as a basis for sanctions against those licensees who in good faith seek to comply with the personal attack principle. We point out that in the analogous case of the equal opportunities provision of Section 315, we have not employed sanctions in the situation where a licensee has a good faith, reasonable doubt as to the provision's applicability. The rules here are thus directed to situations where the licensees do not comply with the requirements of the personal attack principle as to notification and offer of time to respond, even though there can be no reasonable doubt under the facts that a personal attack has taken place (e.g., a statement in a controversial issue broadcast that a public official or other person is an embezzler or a Communist). Statements that the rules will discourage, rather than encourage, controversial programming ignore the fact that the rules do no more than restate existing substantive policy—a policy designed to encourage controversial programming by insuring that more than one viewpoint on issues of public importance are carried over licensees' facilities. See footnote 3, *supra*. Further, we do not perceive any discouragement to controversial issue programming, except for a licensee who wished to present only one side of such programming—namely, the personal attack and not the response by the individual attacked.

10. Several of the comments in this proceeding indicate the mistaken impression that an attack on a specific person or group constitutes, itself, a controversial issue of public importance requiring the invocation of the Fairness Doctrine. This misconceives the principle, based on the right of the public to be informed as to the vital issues of the day, which requires that an attack must occur within the context

of a discussion of a controversial issue of public importance in order to invoke the personal attack principle. The use of broadcast facilities for the airing of mere private disputes and attacks would raise serious public interest issues, but such issues are not the focus of the Fairness Doctrine.

11. Under the principle it has always been the duty of a licensee to forward to a person or group attacked notification of the attack and an offer of an opportunity to respond, rather than to await a request or complaint from the person attacked. The notification requirement is of the utmost importance, since our experience indicates that otherwise the person or group attacked may be unaware of the attack, and thus the public may not have a meaningful opportunity to hear the other side. Again the rule adds no new burden in this respect to the obligations of a broadcast licensee. If an unawareness of this obligation presently exists among licensees despite the Commission's language in *Mapoles, Billings, Times-Mirror, Springfield Television,* The Public Notice of July 25, 1963, and the 1964 Fairness Primer, this only highlights the need for the rule.

12. Paragraph (a) of the rule places specific procedural responsibilities on the licensee over whose facilities a personal attack has been broadcast. A licensee is required to send the attacked person or group, within a reasonable time and in no event later than one week after the attack, a notice of the attack which states when the attack occurred and contains an offer of a reasonable opportunity to respond. Along with the notice, he is required to send a tape, transcript or accurate summary of the attack to the attacked person or group. This time limit should be sufficient to allow a licensee to confer with counsel or with the Commission if

there is doubt as to its obligation. In any event, in the doubtful situation, if the person who possibly has been attacked is notified promptly within the time limit and the licensee seeks clarification of his obligation from his counsel or the Commission, no sanctions would be imposed, because the matter is not finally resolved within the one week period. See par. 9, *supra.*[7] This one week outer time limit does not mean that such a copy should not be sent earlier or indeed, before the attack occurs, particularly where time is of the essence. Other matters are left to the reasonable judgment of the licensee, good faith negotiations, and the Commission's interpretive rulings based on specific factual situations.[8]

13. As we pointed out in the Notice, following present policy (Public Notice of July 1, 1964, (Fairness Primer) FCC 64-611, 29 F. R. 10415, footnote 6) personal attacks on foreign groups or foreign public figures are excluded from coverage by the rule. Also excluded from coverage are personal attacks made by political candidates, their authorized spokesmen, or those associated with them in the campaign against other candidates, spokesmen, or persons associated with them in the campaign. The exclusion of attacks by candidates against other candidates recognizes that the "equal opportunities" provision of Section 315—

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[7]As we stated in the Notice of Proposed Rule Making, where a licensee determines that a personal attack has not occurred but recognizes that there may be some dispute concerning this conclusion, he should keep available for public inspection, for a reasonable period of time, a tape, transcript or summary of the broadcast in question.

[8]Where the attack occurs on paid time, a question has arisen as to whether the response can also be required to be on paid time. We have ruled on this matter in *Letter to John H. Norris (WGCB), aff'd sub nom., Red Lion Broadcasting Co., Inc.* v. *F. C. C., supra.* In view of our ruling, this is a matter not covered by the rule.

and not the personal attack principle—is usually applicable to this situation. The Fairness Doctrine may, of course, be applicable to particular factual situations in the political broadcast field. See, Section 315(a) of the Communications Act of 1934, as amended, 47 U. S. C. 315(a); Public Notice of July 1, 1964, *Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance,* 29 F. R. 10415 (1964).

14. Finally, subsection (c) of the rule clarifies licensee's obligations in regard to station editorials endorsing or opposing political candidates. The appropriate candidate (or candidates) must be informed of a station's editorial opposing his (or their) candidacy or supporting the candidacy of a rival, and must be offered a reasonable opportunity to respond through a spokesman of his choice including, if the licensee so agrees, himself. The language of subsection (c) has been altered from that appearing in the Notice of Proposed Rule Making (FCC 66-291) to make clear that where an editorial endorses a candidate notice and offer of an opportunity to respond must be sent to his opponent, and where an editorial opposes a candidate such notice and offer must be sent to the opposed candidate.

15. The phrase "reasonable opportunity" to respond is used here and in the personal attack subsection because such an opportunity may vary with the circumstances. In many instances a comparable opportunity in time and scheduling will be clearly appropriate; in others such as where the endorsement of a candidate is one of many and involves just a few seconds, a "reasonable opportunity" may require more than a few seconds if there is to be a meaningful response. See, *Final Report of the Senate Committee on Commerce,* S. Rep. No. 944, 87th Cong., 2d Sess., Part 6,

page 7. Notification shall be within 24 hours of the editorial, since time is of the essence in this area and there appears to be no reason why the licensee cannot immediately inform a candidate of an editorial. In most cases licensees will be able to give notice prior to the editorial. Indeed such prior notice is required in instances of editorials broadcast close to the election date, i.e. less than 72 hours before the day of the election. For while such last-minute editorials are not prohibited, we wish to emphasize as strongly as possible that such editorials would be patently contrary to the public interest and the personal attack principle unless the licensee insures that the appropriate candidate (or candidates) is informed of the proposed broadcast and its contents sufficiently far in advance to have a reasonable opportunity to prepare a response and to have it presented in a timely fashion. We have accordingly made this requirement explicit in a proviso to subsection (c).

16. As in the case of the personal attack subsection, the licensee may impose reasonable limitations on the reply, such as requiring the appearance of a spokesman for the candidate to avoid any Section 315 "equal opportunities" cycle.[9] The matter of scheduling responses is left to reasonable judgment and negotiation. Subsection (c) is directed only to station editorials endorsing, or opposing, political candidates. Situations containing aspects of both personal attacks and political endorsements or oppositions may arise, and in such cases rulings on the particular factual settings may be necessary. *Times-Mirror*, 24 Pike & Fischer, R. R. 404 and 407 (1962).

17. Authority for the rules herein adopted is contained in Section 4 (i) and (j), 303 (r) and 315 of the Communications Act of 1934, as amended.

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[9]Barring extraordinary circumstances, the choice of the spokesman is, of course, a matter for the candidate involved.

Appendix A

18. Accordingly, IT IS ORDERED,

that the rules contained in the attached appendix ARE ADOPTED, effective August 14, 1967.

FEDERAL COMMUNICATIONS COMMISSION*

Ben F. Waple
Secretary

Attachment

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*See attached statements of Commissioners Bartley and Loevinger.
NOTE: Rules changes herein will be covered by T. S. III(64)-18.

Appendix A

APPENDIX

In Part 73 §§ 73.123, 73.300, 73.598 and 73.679 all to read identically are added to read as follows:

Personal attacks; political editorials.

(a) When, during the presentation of views on a controversial issue of public importance, an attack is made upon the honesty, character, integrity or like personal qualities of an identified person or group, the licensee shall, within a reasonable time and in no event later than one week after the attack, transmit to the person or group attacked (1) notification of the date, time and identification of the broadcast; (2) a script or tape (or an accurate summary if a script or tape is not available) of the attack; and (3) an offer of a reasonable opportunity to respond over the licensee's facilities.

(b) The provisions of paragraph (a) of this section shall be inapplicable to attacks on foreign groups or foreign public figures or where personal attacks are made by legally qualified candidates, their authorized spokesmen, or those associated with them in the campaign, on other such candidates, their authorized spokesman, or persons associated with the candidates in the campaign.

Note: In a specific factual situation, the fairness doctrine may be applicable in this general area of political broadcasts. See, Section 315(a) of the Act (47 U. S. C. 315(a)); Public Notice: *Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance.* 29 Fed. Reg. 10415.

(c) Where a licensee, in an editorial, (i) endorses or (ii) opposes a legally qualified candidate or candidates, the licensee shall, within 24 hours after the editorial, transmit to respectively (i) the other qualified candidate or candidates for the same office or (ii) the candidate opposed in the editorial (1) notification of the date and the time of the editorial; (2) a script or tape of the editorial; and (3) an offer of a reasonable opportunity for a candidate or a spokesman of the candidate to respond over the licensee's facilities: *Provided, however,* That where such editorials are broadcast within 72 hours prior to the day of the election, the licensee shall shall comply with the provisions of this subsection sufficiently far in advance of the broadcast to enable the candidate or candidates to have a reasonable opportunity to prepare a response and to present it in a timely fashion.

Appendix A

DISSENTING STATEMENT

OF

COMMISSIONER ROBERT T. BARTLEY

The Fairness Doctrine is in the process of being perfected on a case-by-case basis. I believe, therefore, that codification by rule is premature.

Appendix A

Concurring Opinion of Commissioner Lee Loevinger

(Re rule to provide procedure in case of personal attack, etc.)

I concur in the promulgation of a rule specifically providing for the right of reply by a person attacked in a broadcast and by political candidates disadvantaged by poiltical broadcasts, as this seems correct in principle. However, I think that the rule would better achieve its purpose if it were drafted with a clearer delineation of scope and practical operation.

Appendix B

B
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4019

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

Washington, D. C. 20554

IN THE MATTER OF	
Amendment of Part 73 of the Rules to provide procedures in the event of a personal attack or where a station editorializes as to political candidates.	Docket No. 16574

MEMORANDUM OPINION AND ORDER

Adopted: August 2, 1967 Released: August 7, 1967
By the Commission:

Commissioners Bartley, Loevinger and Wadsworth absent; Commissioner Cox concurring in the result.

1. On July 5, 1967, the Commission adopted rules specifying procedures in the event of certain personal attacks and where a station editorializes as to political candidates. In subsection (b) of those rules, we exempted certain situations where the fairness doctrine generally, rather than the personal attack rule, may be applicable. In the processing of a recent complaint, we have become aware of a further instance where clarification of our rules is appropriate.

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2. Specifically, the personal attack rule is inapplicable to the bona fide newscast or on-the-spot coverage of a bona fide news event. In these situations the general fairness doctrine is applicable, and licensees are required to make reasonable good faith judgments upon the particular facts of the case in accordance with that doctrine. See Section 315(a) of the Communications Act of 1934, as amended; *Applicability of the Fairness Doctrine In The Handling Of Controversial Issues of Public Importance,* 29 F. R. 10416. Thus, licensees must make good faith, journalistic judgments as to what is newsworthy and how it should be presented. If the licensee adjudges an event containing a personal attack to be newsworthy, in practice he usually turns, as part of the news coverage to be presented that day or in the very near future, to the other side and again makes the same good faith journalistic judgment as to its presentation and what fairness requires in the particular circumstances. That is normal journalism and fairness in this area. To import the concept of notification within a week period, with a presentation of the person attacked on some later newscast when other news might normally be broadcast, is impractical and might impede the effective execution of the important news functions of licensees or networks. Such a result is not intended under the rules adopted. Finally, the exemption is also being extended to on-the-spot coverage of a bona fide news event, since this category is akin to the newscast area; in this connection, we have also taken into account the consideration that the number of personal attacks occurring in on-the-spot coverage of bona fide news events is unlikely to be large in number, that the notification aspect is relatively less needed in this area, and that on the whole it can be administered readily by applying the fairness doctrine to the specific facts of each case, when and if disputes arise.

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3. The exemption resulting from the above clarification does not extend, however, to editorials or similar commentary, embodying personal attacks, broadcast in the course of the newscasts. The foregoing considerations are inapplicable. Rather, since the licensee has chosen to present a personal attack in his editorial, he should not be the one to determine wholly what the public shall or shall not hear on the other side of a matter affecting the integrity, honesty, and like personal qualities of the person attacked. Under elemental fairness, the person attacked should be afforded a comparable opportunity to give that side, subject to reasonable conditions set by the licensee. See, e.g., Letter to *Station WALG,* FCC 65-50 (1965). More important, the person attacked is the most appropriate spokesman to inform the public of the other side of the attack issue. As noted, the time and practical considerations discussed with respect to the news itself in par. 2, are not usually applicable to an editorial, and even if applicable in an attenuated form, are outweighed by the foregoing factors. Finally, the argument that this might impede the presentation of editorials containing personal attacks is simply an assertion by the licensee that he wishes to broadcast such an editorial, but only if he does not have to present the other side of the attack issue or if he can wholly control what the public may hear concerning this other side, rather than permitting the person so vitally affected by his editorial and with the most knowledge of the issue a reasonable opportunity to reach his listeners.[1]

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[1]For similar reasons, we have not exempted news documentaries. We note that the latter ordinarily do not involve the time and practical considerations discussed in par. 2, and that a documentary, even though fairly presented, may necessarily embody a point of view. We believe, therefore, that the person attacked can readily, and should be, afforded the reasonable opportunity to present his side,

Appendix B

4. It may be that experience will indicate the need or desirability of other revisions, clarifications, or waivers of the rule in particular factual situations. If so, we shall act promptly to make whatever changes the public interest in the larger and more effective use of radio requires. See, e.g., Section 4(b), Administrative Procedure Act. We stress again the purpose of the rules: To delineate better the licensee's responsibilities in this important area and to afford the Commission a further needed sanction to deal with those who flagrantly violate the underlying policies in situations where there is no reasonable question as to the licensee's responsibility.

5. Authority for the rules herein adopted is contained in Section 4 (i) and (j), 303 (r) and 315 of the Communications Act of 1934, as amended; see also, Section 1.108 of the Commission's Rules and Regulations.

---

as the most appropriate spokesman to inform the public on a matter affecting his integrity, etc.

Similarly, the news interviews show, which is akin to many other talk programs, is not exempted. The licensee has chosen to provide one person with an "electronic platform" for an attack, and elemental fairness and the duty to inform the public in the most appropriate manner, dictate that he should afford the person attacked a comparable opportunity. Again, the consideration set forth in par. 2 are inapplicable.

Finally, we note that there are already certain exemptions where the attacks are made by legally qualified candidates, their authorized spokesmen, or those associated with them in the campaign, on other such candidates, their authorized spokesmen, or persons associated with the candidates in the campaign.

Appendix B

6. Accordingly, IT IS ORDERED, that the rule revision contained in the attached appendix ARE ADOPTED, effective August 14, 1967. See Section 4(c), Administrative Procedure Act. This proceeding is terminated.

FEDERAL COMMUNICATIONS COMMISSION

BEN F. WAPLE
Secretary.

Attachement

NOTE: Rules changes herein will be included in a revised edition of Volume III.

Appendix B

APPENDIX

In Part 73 of Chapter I of Title 47 of the Code of Federal Regulations, §§ 73.123(b), 73.300(b), 73.598(b) and 73.679(b) are revised to read identically as set forth in § 73.123 below:

§ 73.123 Personal attacks; political editorials.

* * * * *

(b) The provisions of paragraph (a) of this section shall be inapplicable (i) to attacks on foreign groups or foreign public figures; (ii) where personal attacks are made by legally qualified candidates, their authorized spokesmen, or those associated with them in the campaign, on other such candidates, their authorized spokesmen, or persons associated with the candidates in the campaign; and (iii) to bona fide newscasts or on-the-spot coverage of a bona fide news event (but the provision shall be applicable to any editorial or similar commentary included in such newscasts or on-the-spot coverage of news events).

NOTE: The fairness doctrine is applicable to situations coming within (iii), above, and, in a specific factual situation, may be applicable in the general area of political broadcasts (ii), above. See, Section 315(a) of the Act, 47 U. S. C. 315(a); Public Notice: *Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance.* 29 Fed. Reg. 10415.

* * * * * *

Appendix C

First Amendment, United States Constitution:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

Communications Act of 1934, as amended:

Sec. 315:

> "(a) If any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that office in the use of such broadcasting station: *Provided,* That such licensee shall have no power of censorship over the material broadcast under the provisions of this section. No obligation is imposed upon any licensee to allow the use of its station by any such candidate. Appearance by a legally qualified candidate on any—
>
> (1) bona fide newscast,
>
> (2) bona fide news interview,
>
> (3) bona fide news documentary (if the appearance of the candidate is incidental to the presentation of the subject or subjects covered by the news documentary), or
>
> (4) on-the-spot coverage of bona fide news events (including but not limited to political conventions and activities incidental thereto),

shall not be deemed to be use of a broadcasting station within the meaning of this subsection. Nothing in the foregoing sentence shall be construed as relieving broadcasters, in connection with the presentation of newscasts, news interviews, news documentaries, and on-the-spot coverage of news events, from the obligation imposed upon them under this chapter to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance.

(b) The charges made for the use of any broadcasting station for any of the purposes set forth in this section shall not exceed the charges made for comparable use of such station for other purposes.

(c) The Commission shall prescribe appropriate rules and regulations to carry out the provisions of this section. (47 U. S. C., 1964 ed., Sec. 315.)"

Sec. 326:

"Nothing in this chapter shall be understood or construed to give the Commission the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication. (47 U. S. C., 1964 ed., Sec. 326.)"

Judicial Code:

Sec. 1254(1):

"Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

Appendix C

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree; . . ." (28 U. S. C., 1964 ed., Sec. 1254(1))

Rule 20 of the Rules of this Court:

"A writ of certiorari to review a case pending in a court of appeals, before judgment is given in such court, will be granted only upon a showing that the case is of such imperative public importance as to justify the deviation from normal appellate processes and to require immediate settlement in this court. See *United States* v. *Bankers Trust Co.*, 294 U. S. 240; *Railroad Retirement Board* v. *Alton R. Co.*, 295 U. S. 330; *Rickert Rice Mills* v. *Fontenot*, 297 U. S. 110; *Carter* v. *Carter Coal Co.*, 298 U. S. 238; *Ex parte Quirin*, 317 U. S. 1; *United States* v. *United Mine Workers*, 330 U. S. 258; *Youngstown Co.* v. *Sawyer*, 343 U. S. 579."

In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 993

RADIO TELEVISION NEWS DIRECTORS ASSOCIATION, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA AND FEDERAL COMMUNICATIONS COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI BEFORE JUDGMENT TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR RESPONDENTS IN OPPOSITION

Petitioners seek certiorari before judgment to obtain direct review in this Court of orders of the Federal Communications Commission adopted in 1967 which promulgate certain rules governing personal attacks and political editorials broadcast over facilities of Commission licensees. Their petitions for review in a court of appeals under 28 U.S.C. (Supp. II) 2342—challenging the rules as unauthorized by the Communications Act and in violation of the First Amendment—are presently pending before the Seventh

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Circuit, and that court has not yet considered the merits of the petitions.

Petitioners urge that certiorari be granted in advance of any consideration of their challenge to the Commission's rules by the court of appeals, or indeed any court, so that the case can be considered here together with *Red Lion Broadcasting Co.* v. *Federal Communciations Commission,* No. 600, this Term in which certiorari was granted on December 4, 1967. *Red Lion* involves an application of the Commission's "fairness doctrine," upon which the Commission's new rules are based, to a personal attack against a political writer which was broadcast in 1964 over radio station WGCB, in Red Lion, Pennsylvania. On the facts there presented the Commission held that it was the station's duty under the fairness doctrine to inform the person impugned of the attack and to offer him a comparable opportunity to respond. On petition for review by the station's licensee, the Court of Appeals for the District of Columbia Circuit sustained the Commission.

While the petition for certiorari in *Red Lion* was pending, the instant petitioners filed briefs *amici curiae* urging that the Court defer disposition of that petition until the Seventh Circuit had decided the merits of their challenge to the Commission's rules. The government opposed this suggestion on the ground that *Red Lion* "involves a concrete and focused application of the Fairness Doctrine, while the Seventh Circuit cases present a sweeping attack on necessarily general rules, unilluminated by specific facts" (Br. in Opp., p. 12). After certiorari was granted, the government moved the Seventh Circuit

to hold petitioners' challenges to the rules in abeyance pending this Court's decision in *Red Lion*.[1] Further proceedings in the court of appeals have been deferred pending disposition of the instant petition by this Court.

DISCUSSION

Although the *Red Lion* case raises constitutional and statutory issues which have close relation to the instant case, we believe that it would be inappropriate for this Court to review the Commission's rules in advance of decision by the court of appeals. First, such action would constitute initial review of agency regulations by this Court, at least arguably an exercise of original jurisdiction not authorized by the Constitution; we suggest it would be inappropriate to resolve that serious and difficult question in circumstances where there is no compelling need to do so. Moreover, the general and abstract nature of petitioners' across-the-board attack on the rules, in contrast to the concrete controversy presented in *Red Lion*, makes it highly desirable that the issues in the instant case be sifted and refined by the court of appeals before they are presented to this Court. Finally, to the extent that petitioners' interests are directly

[1] In its motion the government asserted that, in view of the fact that the cases "present the same fundamental issues of the constitutionality and statutory basis of the Commission's fairness doctrine and personal attack policy as does *Red Lion*, we believe that it would serve the ends of justice and avoid an unnecessary burden upon the judicial process to hold these cases in abeyance pending resolution of these basic issues by the Supreme Court" (Motion of Resp. to hold petitions for review in abeyance, C.A. 7, Nos. 16,369, 16,498, 16,499).

affected by the issues presented in *Red Lion*, they can adequately represent those interests—and assist this Court—by submitting briefs as *amici curiae* in that case.[2]

1. Although this Court's appellate jurisdiction is defined by Congress (*Cohens* v. *Virginia*, 6 Wheat. 264; *Ex parte McCardle*, 7 Wall. 506), its original jurisdiction is defined by the Constitution itself—in Article III, Section 2—and can neither be expanded nor contracted by statute. *Marbury* v. *Madison*, 1 Cranch 137. Initial review of regulations of an administrative agency is plainly not within the scope of this Court's original jurisdiction as defined in the Constitution. Petitioners do not dispute this (Pet. 14–15). What they assert, however, is that review of agency action by granting certiorari in advance of judgment by a lower court constitutes an exercise of this Court's appellate, not original, jurisdiction (*ibid.*). As petitioners concede, this constitutional question has as yet not been definitely resolved by this Court (Pet. 14). Whatever indications there are on this question in the reported decisions of this Court cast serious doubt on petitioners' proposition that initial judicial review of agency action constitutes an exercise of appellate jurisdiction. See *Wheeler Lumber Bridge & Supply Co.* v. *United States*, 281 U.S. 572, 576; *Old Colony Trust Co.* v

[2] Indeed, petitioners obtained the government's consent to file *amici* briefs in *Red Lion* when that case was pending on petition for certiorari, and we have already consented to their filing *amici* briefs on the merits in that case. Petitioners have also filed a motion for leave to argue *amici curiae* in *Red Lion* should the instant petition not be granted.

Commissioner of Internal Revenue, 279 U.S. 716, 728–729; *United States* v. *Rice,* 327 U.S. 742, 747; see also *International Ass'n of Machinists* v. *National Labor Relations Board,* 361 U.S. 881, where certiorari before judgment in a court of appeals' proceedings for review of a Board order was sought and denied.

It can of course be argued, as do petitioners, that judicial review of agency action is essentially an appellate function because the reviewing court simply "revises and corrects the proceedings in a cause already instituted, and does not create that cause." *Marbury* v. *Madison,* 1 Cranch 137, 175. If that argument has force, it would appear to be in a case where an agency has acted in a quasi-judicial capacity rather than where, as here, judicial review of quasi-legislative action—rulemaking—is sought. In the latter situation, as in actions to enjoin the operation of statutes, it is more difficult to maintain that a "cause already instituted" is involved and that the suit is essentially a continuation of proceedings before the legislative body. Cf. *Ex parte Young,* 209 U.S. 123. Here there has been no judgment by any court as to the validity or invalidity of the Commission's rules. Yet this Court can ordinarily exercise appellate jurisdiction only by affirming, reversing or modifying the order or decision before it for review.

Petitioners' reference to the fact that this Court has considered certified questions relating to agency action prior to judgment in a lower court is beside the mark. In such cases the court of appeals has given consideration to the questions raised and has acted

judicially in formulating the certificate which is filed in this Court. Under the certification procedure this Court simply answers the question posed, affirmatively or negatively; there is thus no need for a judgment or order below upon which the Court can act in a reviewing capacity. And the certification procedure has traditionally been restricted to "definite and distinct questions of law" to avoid the possibility, which might otherwise exist, that the court in considering and deciding a certified question would be exercising original, rather than appellate, jurisdiction. *E.g., Old Colony Trust Co., supra; Wheeler Lumber Bridge & Supply Co., supra.*[3]

Moreover, this Court has consistently avoided reaching and deciding constitutional questions when it was unnecessary to do so. This approach should peculiarly apply to constitutional questions relating to the scope of the Court's own jurisdiction under Article III. We are not prepared to assert that all situations where direct review of agency action is sought would involve an improper exercise of this Court's original jurisdiction. We do view the question as a difficult one, and believe that it should not be resolved unless and until presented in a context where it appears essential for the Court to review an agency action directly, if it is found to have constitutional authority to so act. The instant case, we submit, does not present such a situation. Here petitioners can plainly

[3] Nothing in the language of 28 U.S.C. 1254(3) nor in Rule 28(2) of this Court's revised rules is to the contrary. See *United States* v. *Rice*, *supra;* see also Rule 28(1) of this Court's revised rules.

achieve their basic purpose—insuring that their voice is heard in connection with the Court's consideration and resolution of the issue presented in *Red Lion* (see Pet. 13)—through other means (see note 2, *supra*). Sound judicial policy thus argues against reaching and resolving the constitutional issue which petitioners present.

2. We realize, of course, that the Court has occasionally granted certiorari before judgment in order that it might have before it several related cases for consideration and decision at the same time (see Pet. 14, n. 21). But this has hardly been a uniform or invariable practice; the grant of certiorari before judgment has depended on the particular situations involved on each occasion. Here, in our view, there are distinctions between *Red Lion* and the instant case which, especially in light of the jurisdictional issue (discussed *supra*, pp. 4–7), argue against following the suggested procedure.

First, as petitioners point out, *Red Lion* involves a concrete, after-the-fact application of the general fairness doctrine to a specific personal attack. Petitioner in that case complains of a defined injury as a result of the Commission's order directed against it, and challenges the fairness doctrine in the context of the Commission's express ruling which is there involved. Moreover, the Court in *Red Lion* will have the benefit of the court of appeals' consideration of the issues presented, including the D.C. Circuit's extensive opinion. On the other hand, the contentions of petitioners in the instant case do not arise in a specific context at all. There is no record of any concrete, alleged violation by any of them. Instead, they make

a sweeping and generalized attack on the Commission's rules, and a variety of contentions about the arguable scope of rules. If this is an appropriate case for judicial review,[4] the court of appeals, by exercising the exclusive jurisdiction Congress conferred on it under 28 U.S.C. (Supp. II) 2342, can perform the important function of sifting and refining the issues so as to avoid unnecessary decision of constitutional issues, and provide this Court with a developed record on which to assess the conflicting positions of petitioners and the government.

Second, as petitioners also point out, the *Red Lion* case is limited to the personal attack aspects of the fairness doctrine. The Commission's rules, however, also contain provisions for response to editorials by political candidates. Unlike the personal attack doctrine involved in *Red Lion,* the principles underlying these rules have not been considered, even indirectly, by a court of appeals. Sound judicial practice requires, in our view, that their scope and effect be initially considered by the court of appeals before the substantial issues they present are considered by this Court.

Finally, the issues in the instant case may be further narrowed and refined in the light of this Court's decision in the *Red Lion* case. The decision may go far to support the action of the Commission in prescrib-

[4] The United States entertains some doubt that so sweeping an attack on a "legislative" regulation of this sort is an appropriate occasion for judicial review in the absence of actual and concrete facts showing real and direct harm. To the extent that there is substance to these doubts, this is another reason for declining to review the case now.

ing the challenged rules; or, depending on the scope of that decision, the agency itself may be constrained to reconsider and possibly revise its rules. Should it do so, the issues in the court of appeals may be further limited or even eliminated.[5]

3. We of course recognize the important issues which are presented by petitioners' challenge to the Commission's rules in terms of free speech. Both RTNDA and NBC (but not CBS) are challenging the fairness doctrine itself as well as the rules the Commission has issued to implement it. Petitioners' essential concern seems to be that this Court will decide *Red Lion* without their having an opportunity to express their views, and that the decision may prejudice their attack on the rules in the Seventh Circuit. They can satisfy this concern, however, by filing *amici* briefs in the *Red Lion* case, to which we have already given our consent.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari in advance of judgment should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

JANUARY 1968.

[5] Accordingly, we oppose as well petitioners' suggestion (Pet. 18) that, if certiorari is denied here, the Court's order should state that such denial is without prejudice to an immediate application to the Seventh Circuit for certification of the issues they raise to this Court. We note that certiorari was granted in *Red Lion* despite petitioners' *amici* request that action in that case be deferred pending decision by the Seventh Circuit in the instant case.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 993

RADIO TELEVISION NEWS DIRECTORS ASSOCIATION, *ET AL.*,

Petitioners,

v.

UNITED STATES OF AMERICA AND FEDERAL COMMUNICATIONS COMMISSION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI BEFORE JUDGMENT TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITIONERS' REPLY TO MEMORANDUM FOR RESPONDENTS IN OPPOSITION

Of Counsel:
HARRY KALVEN, JR.
1111 East 60th Street
Chicago, Illinois 60637

MAURICE ROSENFIELD
208 South LaSalle Street
Chicago, Illinois 60604

Of Counsel:
HERBERT WECHSLER
435 West 116th Street
New York, New York 10027

NEWTON N. MINOW
208 South LaSalle Street
Chicago, Illinois 60604

Of Counsel:
THOMAS E. ERVIN
HOWARD MONDERER
DOUGLAS E. CUTLER

ARCHIBALD COX
Langdell Hall
Cambridge, Massachusetts 02138

W. THEODORE PIERSON
ROBERT M. LICHTMAN
1000 Ring Building
Washington, D. C. 20036
Counsel for Petitioners, Radio Television News Directors Association, et al.

LLOYD N. CUTLER
J. ROGER WOLLENBERG
TIMOTHY B. DYK
900 17th Street, N. W.
Washington, D. C. 20006

RICHARD W. JENCKS
51 West 52 Street
New York, New York 10019
Counsel for Petitioner, Columbia Broadcasting System, Inc.

LAWRENCE J. MCKAY
RAYMOND L. FALLS, JR.
80 Pine Street
New York, New York 10005
Counsel for Petitioner, National Broadcasting Company, Inc.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 993

RADIO TELEVISION NEWS DIRECTORS ASSOCIATION, *et al.*,
Petitioners,

UNITED STATES OF AMERICA AND
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Respondents.

ON PETITION FOR A WRIT OF CERTIORARI BEFORE JUDGMENT TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITIONERS' REPLY TO MEMORANDUM FOR RESPONDENTS IN OPPOSITION

1. Respondents concede that the petition raises "important issues" and that "*Red Lion* . . . raises constitutional and statutory issues which have close relation to the instant case . . . ." Respondents' Memorandum In Opposition, pp. 3, 9. The thrust of respondents' opposition is that petitioners' concerns can be fully satisfied by *amicus* participation in *Red Lion*.[1] But only by hearing this case together with *Red Lion* will the Court, when it passes on the Commission's personal attack doctrine for the first time, have before it

[1]Petitioners have moved for time for oral argument in *Red Lion*, if certiorari is denied herein.

a broad range of prospective applications of the doctrine and a comprehensive record.

2. Respondents urge that the constitutional questions be considered first in the precise factual context of *Red Lion* because an overall examination of the Commission's rules and its personal attack policy is not appropriate.[2] Petitioners submit that such an overall examination is not only appropriate but required. A rule or policy affecting First Amendment rights of free speech must be tested on its face and not merely as applied in the particular circumstances of *Red Lion* or any other case. See, *e.g., Dombrowski* v. *Pfister,* 380 U. S. 479 (1965); *Bantam Books, Inc.* v. *Sullivan,* 372 U. S. 58 (1963); *Thornhill* v. *Alabama,* 310 U. S. 88 (1940).

The critical constitutional issue presented both here and in *Red Lion* is the inhibitory before-the-fact effect of the Commission's doctrine on the broadcast of personal attacks in the course of broadcast journalism. This effect must be measured by considering the doctrine on its face, and can best be ascertained in the context of the new rules, rather than an after-the-fact order in a particular case. The new rules, which supersede the earlier policies involved in *Red Lion,* will govern all current and future "personal attacks."[3]

---

[2]The United States goes further to suggest that the controversy as to the legality of the Commission's rules may not be ripe for adjudication. Memorandum In Opposition, p. 8, n. 4. (This position we note is attributed to "the United States" rather than "respondents.") Such an argument is foreclosed by decisions of this Court holding that Commission rules may be immediately challenged in the courts by affected parties. *United States* v. *Storer Broadcasting Co.,* 351 U. S. 192 (1956); *Columbia Broadcasting System, Inc.* v. *United States,* 316 U. S. 407 (1942). See also *Abbott Laboratories* v. *Gardner,* 387 U. S. 136 (1967); *Frozen Food Express* v. *United States,* 351 U. S. 40 (1956).

[3]Respondents' suggestion (Memorandum In Opposition, p. 9) that the Commission might "reconsider or possibly revise" its rules after *Red Lion* is decided is not only speculative, but also ignores the continuing suppression of claimed First Amendment rights until such time as the Commission takes further action.

They make changes in the scope of the doctrine and add significant new sanctions for violation. It follows that this case presenting the currently operative rules should be before this Court together with *Red Lion* when the first constitutional test of the doctrine is made.

3. The free speech questions raised in this case deserve prompt review. The deterrent effect of the Commission's new personal attack rules is being inflicted daily on broadcasters. Whatever their force in other contexts, arguments in favor of piecemeal adjudication are inappropriate here. "[T]hose affected by a statute [affecting free speech] are entitled to be free of the burdens of defending prosecutions, however expeditious, aimed at hammering out the structure of the statute piecemeal, with no likelihood of obviating similar uncertainty for others." *Dombrowski* v. *Pfister,* 380 U. S. 479, 491 (1965). "By permitting determination of the invalidity of these statutes without regard to the permissibility of some regulation on the facts of particular cases, . . . [this Court has], in effect, avoided making vindication of freedom of expression await the outcome of protracted litigation." *Id.* at 487.

4. Respondents also advert to possible doubts as to the Court's appellate jurisdiction. But they ignore the fact that the Commission in this case has not merely acted legislatively to promulgate rules, it has also acted judicially to determine express challenges to the validity of its rules. Moreover, the same imperative First Amendment considerations which favor prompt and definitive adjudication of the legality of the Commission's rules militate against narrow construction of this Court's certiorari jurisdicton. See *Mills* v. *Alabama,* 384 U. S. 214, 220-22 (1966) (Douglas and Brennan, JJ., concurring). See also *Construction La-*

borers v. *Curry*, 371 U. S. 542, 550 (1963); *United States Alkali Export Ass'n.* v. *United States*, 325 U. S. 196, 203-04 (1945).

Respectfully submitted,

Of Counsel:

HARRY KALVEN, JR.
1111 East 60th Street
Chicago, Illinois 60637

MAURICE ROSENFIELD
208 South LaSalle Street
Chicago, Illinois 60604

ARCHIBALD COX
Langdell Hall
Cambridge, Massachusetts 02138

W. THEODORE PIERSON
ROBERT M. LICHTMAN
1000 Ring Building
Washington, D. C. 20036
Counsel for Petitioners, Radio Television News Directors Association, et al.

Of Counsel:

HERBERT WECHSLER
435 West 116th Street
New York, New York 10027

LLOYD N. CUTLER
J. ROGER WOLLENBERG
TIMOTHY B. DYK
900 17th Street, N. W.
Washington, D. C. 20006

NEWTON N. MINOW
208 South LaSalle Street
Chicago, Illinois 60604

RICHARD W. JENCKS
51 West 52 Street
New York, New York 10019
Counsel for Petitioner, Columbia Broadcasting System, Inc.

Of Counsel:

THOMAS E. ERVIN
HOWARD MONDERER
DOUGLAS E. CUTLER

LAWRENCE J. MCKAY
RAYMOND L. FALLS, JR.
80 Pine Street
New York, New York 10005
Counsel for Petitioner, National Broadcasting Company, Inc.

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